

Congress of the United States
Washington, DC 20515

September 22, 2020

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Secretary DeVos:

On October 22, 2019, many of us wrote to you and Assistant Secretary for Civil Rights Kenneth Marcus to request information about the Department of Education's (the Department) efforts to protect the civil rights of LGBTQ students. We requested internal agency communications and a number of agency documents to better understand the Office for Civil Rights (OCR)'s policies for processing sexual orientation and gender identity-related complaints. That letter is attached as Attachment A.

On March 26, 2020, Mr. Marcus responded to the October 22 request by providing only written responses without documentation, references to documents that were already publicly available, and a copy of a letter sent to Representative Green that also included some information on this topic. As a result, many of our original questions remain unanswered. Complete and transparent responses are even more critical in light of allegations that Mr. Marcus and OCR mishandled a transgender athletes' complaint. Specifically, a former lawyer in OCR has claimed that Mr. Marcus used his office to rollback transgender rights by rushing through the investigation and basing the ruling on faulty legal reasoning.¹ Since our previous letter, the lawyer has left the department after facing retaliation.²

In May 2020, the Department again ruled against transgender rights, concluding that policies that allow transgender students to participate in athletics based on their gender identity violate Title IX.³ This is another example of the Department, under Mr. Marcus, taking steps to erode transgender rights.

¹ Erica L. Green, "Education Dept.'s Civil Rights Chief Steps Down Amid Controversy," *The New York Times* (July 27, 2020), <https://www.nytimes.com/2020/07/27/us/politics/kenneth-marcus-education-department.html>.

² Id.

³ Michael Levenson and Neil Vigdor, "Inclusion of Transgender Student Athletes Violates Title IX, Trump Administration Says," *The New York Times* (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/connecticut-transgender-student-athletes.html?auth=login-google>

We request immediate responses to the requests for documentation detailed below:

1. Copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents that instruct OCR staff on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination.

The Department's March 26, 2020 response provides clarification that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX.

The Department's March 26, 2020 response also refers to the "Instructions to the Field re Complaints Involving Transgender Students" that was sent to OCR staff on June 6, 2017. This document is not publicly available and a search of the title on the Department's website only yields the letters to Representatives Green and the signatories of the previous letter. Please provide a copy of the June 6, 2017 instructions.

2. Copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents or instructions OCR staff have received on processing complaints related to facilities access for transgender students in light of the February 22, 2017 Dear Colleague letter.

The Department's March 26, 2020 response does not provide additional information beyond its response to question 1. Please clarify whether OCR provides training to staff on how to evaluate transgender complaints.

3. Documents sufficient to show how OCR considers complaints filed by the Alliance Defending Freedom or the Family Research Council and documentation sufficient to show the nature of these complaints.

The Department's March 26, 2020 response did not provide documentation on the complaints filed by either the Alliance Defending Freedom or the Family Research Council. Please provide documentation of these groups' complaints.

4. Documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

The Department's March 26, 2020 response did not produce documentation. Therefore, to date, the Department has failed to respond to this request.

5. Documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating in the 6th and 7th Federal circuit courts.

Since the Department's March 26, 2020 response, the Supreme Court ruled that civil rights law protects gay, lesbian, and transgender people from discrimination in employment.⁴ Please provide documentation sufficient to show how OCR has incorporated this ruling into its processes for adjudicating complaints alleging discrimination based on sexual orientation or gender identity.

Furthermore, the 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity (see *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir., 2017); *Dodds v. United States Department of Education*, 845 F.3d 217 (6th Cir., 2016)). The March 26, 2020 response, however, states that OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. Please clarify whether OCR is following the 6th and 7th Circuit court orders regarding sex discrimination based on sex stereotyping, gender nonconformity, and gender identity.

7. Documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

The Department's March 26, 2020 response did not provide the internal documents we requested; rather it refers to the authority OCR relies on to make its determinations. Please confirm whether there are guidelines provided to OCR staff on how to analyze these complaints, and if there are guidelines, provide those guidelines and related documents to Congress as requested.

8. Copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions that OCR received from the White House on interpreting Title IX as it relates to sexual orientation or gender identity.

The Department's March 26, 2020 response provides direction from the Department of Justice and not the White House, and therefore is unresponsive. Please respond by providing letters, memos, etc. from the White House that direct OCR's interpretation of the Title IX as it relates to sexual orientation or gender identity.

9. Copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions that OCR received from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity

The Department's March 26, 2020 response references public appeals court documents, but does not clarify if the Department of Justice provided direction to the Department of Education. Please provide the documentation we requested.

⁴ Nina Totenberg, "Supreme Court Delivers Major Victory to LGBTQ Employees," *NPR* (June 15, 2020), <https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees>.

The Department's failure to fully respond to these requests is interfering with Congress' constitutional authority and duty to conduct oversight. We reiterate the requests above and request that you provide the information and documents as soon as possible, but no later than October 22, 2020. Thank you for your attention to this request.

Sincerely,

A handwritten signature in cursive script that reads "Suzanne Bonamici".

Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human Services

Raúl M. Grijalva
Pramila Jayapal
Susan Wild
Jahana Hayes
Donna E. Shalala
Lori Trahan
Cindy Axne
Lucille Roybal-Allard
Eddie Bernice Johnson
Alcee L. Hastings
Jackie Speier
Brian Higgins
Suzan K. DelBene
Debbie Dingell
Earl Blumenauer
Nydia M. Velázquez
Sharice L. Davids
Brendan F. Boyle
Alan Lowenthal
Jan Schakowsky
Grace Meng
Deb Haaland
Ruben Gallego
Ayanna Pressley
Judy Chu
Anna G. Eshoo
Stephen F. Lynch
Ed Case
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Peter Welch
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Madeleine Dean
Derek Kilmer

Ro Khanna
Henry C. “Hank” Johnson, Jr.
Joseph D. Morelle
Eleanor Holmes Norton
Mary Gay Scanlon
Seth Moulton
Darren Soto
Ann McLane Kuster
Joseph P. Kennedy, III
Barbara Lee
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